

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

KSBW-TV, HEARST-ARGYLE
STATIONS INC.

Employer

and

Case 32-RD-1391

Katharine Pape
Petitioner

and

KSBW-TV, HEARST-ARGYLE
STATIONS INC.

Employer-Petitioner

and

Case 32-RM-779

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,
LOCAL 45

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned finds: ¹

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated and I find that the Employer is a Nevada corporation, which is engaged in the operation of KSBW-TV, a television broadcasting station at its Salinas, California facility. KSBW-TV is an NBC affiliate, and I take note that as such it televises news, sports, entertainment programs and commercials provided by the NBC network to its affiliates nationwide. During the past 12 months, the Employer has received gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$5,000 directly from suppliers located outside the State of California. Therefore, as stipulated to by the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. By their respective petitions, Petitioner and Employer-Petitioner seek an election in the following unit:

¹ The Employer and the Petitioner filed timely briefs, which have been duly considered.

All full-time and regular part-time reporters, producers, master control operators, engineering maintenance technicians, news photographers and editors group, directors group, production assistance group, associate producers, janitorial and weekend assignment editor/associate producers, excluding all anchors office clerical employees, promotion employees, sales employees, guards and supervisors as defined in the Act.

6. The Union contends that both petitions are barred by the doctrine of contract bar and contends that the petitioned for unit is not appropriate.

THE FACTS

The Employer operates KSBW-TV, Channel 8 at its facility in Salinas, California. It serves the California Central Coast area, which includes parts of Santa Cruz, San Benito and Monterey counties. KSBW-TV produces five newscasts daily during the week, and two newscasts daily on weekends. KSBW-TV also produces special programs on a recurring basis. KSBW-TV employs approximately 90 employees.

Lawton Dodd is the News Director for the News Department of KSBW-TV. The Assistant News Director and the Assignment Director report directly to Dodd. An Assignment Manager, Assignment Editors, Producers, Reporters, Photographers, Editors and Associate Producers are also in the News Department.

James Grimes is the Chief Engineer of the Engineering Department. Directors, Master Control Operators and Production Assistants are also in the Engineering Department.

Producers, under the direction of the News Director and the Assistant News Director, are responsible for the content of a newscast. Associate Producers assist the

producer with the production of the newscast. Associate Producers also act as a Producer when the Producer is on vacation, out sick and during the weekend, when Producers are not scheduled to work. Photographers and Reporters work together to produce field reports. Photographers shoot film of Reporters when Reporters report stories on location and also act as Reporters when there is no Reporter in the field. The Weekend Assignment Editor acts as an Associate Producer three days a week, and as a producer two days a week. Editors, Production Assistants, Reporters and Photographers all edit videotape. Producers, Associate Producers, Photographers, the News Director, the Assistant News Director and Production Assistants all operate the teleprompter.

On October 10, 2000, the Union filed a petition in Case 32-RC-4821 seeking to represent a nearly wall-to-wall unit of employees at KSBW-TV.² The record indicates that, in response to the Employer's position during the processing of the initial petition, the Union amended its initial petition to exclude Producers and Reporters, and on October 27, 2000, filed a second petition in Case 32-RC-4825 seeking to represent a unit comprised solely of the Producers and Reporters.

On December 13, 2000, the Acting Regional Director of Region 32 issued a Decision and Direction of Election covering both of the Union's petitions. On January 19, 2001,³ a majority of employees in each unit selected the Union as their exclusive bargaining representative, and the Acting Regional Director certified the Union as the

² Specifically, the Union sought a unit of all full-time and regular part-time photographers, editors, reporters, producers, directors, master control operators, maintenance and engineering employees employed by the Employer at the Salinas facility, excluding office clerical employees, full-time anchors, sales staff, supervisors and guards as defined in the Act.

³ Hereafter, unless otherwise noted, all dates refer to calendar year 2001.

exclusive bargaining representative for the unit in Case 32-RC-4821, (hereinafter referred to as Unit A),⁴ and the unit in case 32-RC-4825, (hereinafter referred to as Unit B).⁵

Following certification, the parties began bargaining over an initial contract. The record reflects that the parties agreed to bargain over a contract for Unit A, before bargaining over a contract for Unit B. The parties began bargaining on March 15 and continued bargaining approximately once a month through December. On August 3, an issue arose regarding a no-strike provision, which would have required members of Unit A to cross a Unit B picket line. The Union then proposed merging Unit A and Unit B into one unit, herein called the Merged Unit.

On October 19, the Employer agreed to combine the units.⁶ The parties reached a tentative agreement on a contract on December 5.⁷ The employees, voting as a single unit, ratified the contract containing the Merged Unit on December 18. Petitioner Pape filed the instant RD petition on January 22, 2002. Representatives of the Union and the

⁴ The unit description for Unit A is all full-time and regular part-time master control operators, maintenance engineers, production assistants, directors, news photographers, tape coordinators, associate producers, and custodians, employed by the Employer at its Salinas, California facility; excluding all producers, reporters, anchors, weekend producer/assignment editor, chief news photographer, office clerical employees, promotion employees, sales employees, guards and supervisors as defined in the Act.

⁵ The Unit description for Unit B is all full-time and regular part-time producers and reporters employed by the Employer at its Salinas, California facility; excluding all anchors, master control operators, maintenance engineers, production assistants, directors, news photographers, tape coordinators, associate producers, custodians, office clerical employees, promotion employees, sales employees, guards and supervisors as defined in the Act.

⁶ In its proposal dated October 19, the Employer stated "we accept your proposal to combine both units as set forth in Section 2.02" Section 2.02 of the proposal defines the collective bargaining unit.

⁷ The recognition clause found in Section 2.02 of the agreed-upon contract defines the bargaining unit as "all full-time and regular part-time Master Control Operators, Maintenance Technicians, Directors, News Photographers & Editors, Production Assistants, Associate Producers, Janitorial Employees, Producers, Reporters Weekend Assignment Editor/Associate Producer, excluding all other employees and supervisory personnel of the Employer."

Employer signed the contract on February 15, 2002 and February 21, 2002 respectively. On February 25, 2002 the Employer-Petitioner filed the instant RM petition. The IBEW International Union signed the contract on April 18, 2002.⁸

POSITIONS OF THE PARTIES

The Union asserts that there was a valid contract between the parties and therefore that the contract bars processing the instant petitions. The Union further contends that the individual certified units make up the only appropriate units. Petitioner and Employer/Employer contend that the contract bar doctrine is inapplicable to this case and that the single unit, as set forth in each petition, is an appropriate unit.

ANALYSIS

1. Contract Bar

A valid collective bargaining agreement serves as a bar to an election. See *Hexon Furniture Co.*, 111 NLRB 342 (1955). To constitute a bar, the contract “must be signed by all the parties before a petition is filed and unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the parties consider it properly concluded and put into effect some or all of its provisions.” *Appalachian Shale Products Co.*, 121 NLRB 1160, 1162 (1958). Even if terms of an agreement apply retroactively, contracts signed after the filing of a petition cannot serve as a bar. See *Hotel Employers Association of San Francisco*, 159 NLRB 143, 146 (1966). Moreover, when one petition under Section 9(c) is timely filed, and a second petition is filed during the pendency of the unresolved question concerning representation raised by the earlier

⁸ On December 18, the Employer’s President and General Manager sent the KSBW-TV staff a memo, which acknowledged the employees’ ratification of the contract and indicated that the contract would be implemented after the contract was executed by the IBEW International Union and returned to the Employer.

petition, the contract-bar doctrine is rendered inoperative as to the later petition. See *Weather Vane Outwear Corporation*, 233 NLRB 414, 415 (1977).

Here, although the parties reached an agreement on the terms of the collective bargaining agreement on December 5, Petitioner Pape filed the instant RD petition before either party signed the agreement. As noted above, the parties' mere agreement on the terms of the contract, without a signed contract, does not bar an election. See *Hotel Employers Association of San Francisco*, 159 NLRB at 146. Given that the initial RD petition is not barred by the contract, the subsequent RM petition is likewise not barred, even though the RM petition was filed after the contract was signed. See *Weather Vane Outwear Corporation*, 233 NLRB at 415. Thus I find that the instant petitions are not barred by the collective bargaining agreement.

2. Appropriate Unit

Typically, the petitioned-for unit in a decertification election must be coextensive with the certified unit. See *West Lawrence Care Center, Inc.* 305 NLRB 212, 216 (1991). However, a unit that differs from the certified unit may be appropriate in a decertification election where there is "unmistakable evidence that the parties agreed to extinguish the separateness of the previously recognized or certified units." *Scott Paper Company*, 257 NLRB 699, 700 (1981).

I find that the Employer and the Union intended to and did extinguish the previously certified separate units. On August 3, the Union proposed to combine the separate units into the Merged Unit. The Employer agreed to this proposal on October 19. The recognition clause of all subsequent proposals set forth the Merged Unit, not Units A and B. On December 5, the parties resolved the other outstanding bargaining

issues and agreed on a contract, which included the Merged Unit. The Union's ratification vote was held in the Merged Unit, and both parties and the IBEW International Union executed the contract. I also note that the record does not reflect any oral or written statements made by either party after the merger of the units demonstrating that either party intended to retain separate units.

Although the Union acknowledges that during the bargaining it and the Employer agreed to the Merged Unit, the Union argues that despite this agreement they bargained as if there were still a separate Unit A and Unit B. In support of this argument, the Union points to differing wage/salary systems for the employees in the former Unit A compared to those in the former Unit B classifications; the limiting of certain cross-training to employees in former Unit A classifications, and the limiting of the layoff criteria to the former Unit A classifications. However, the Board has previously found that differences in these types of contractual provisions do not establish an intent to retain separate units. See *Armstrong Rubber Company*, 208 NLRB 513, 514 (1974). Similarly, I find that the three instances of differential treatment within a contract that covers a broad range of employee terms and conditions of employment, are insufficient to overcome the unequivocal language contained in the recognition clause. Thus, there is unmistakable evidence that the Employer and Union intended to and did extinguish the previously certified separate units and created the Merged Unit. See *Green-Wood Cemetery*, 280 NLRB 1359, 1359-60 (1986) (finding, under similar circumstances, that the parties intended to merge separate units).⁹

⁹ I find cases such as *Duke Power Company*, 191 NLRB 308 (1971), do not require a different result. In *Duke Power Company*, the employee petitioners, supported by the employees who had signed the applicable showing of interest for the respective petitions, sought a decertification election in three individual units that had been merged into a larger unit by the union and the employer in about 1967,

The Union also contends that the Merged Unit is inappropriate because the employees who were previously in Unit A do not share a sufficient community of interest with the employees who were formerly in Unit B. Factors showing a separate community of interest between groups of employees are of particular import in an initial representation case. However, in a decertification case where the parties have merged two previously separate units into one unit, the Board 's focus is on the reality of the merger, not on community of interest factors. See *Gold Kist, Inc.*, 309 NLRB 1, 2 (1992). (where the Board did not consider the community of interest factors regarding a merged unit that had been existence for an extended period).

Even assuming that a community of interest analysis is necessary to conduct a decertification election in a merged unit, I find that the evidence in this case is sufficient to establish that the employees in the Merged Unit share a sufficient community of interest to constitute an appropriate unit. The employees in the Merged Unit work at or report to the Employer's main facility; although, some of the Merged Unit employees may also perform some work at satellite facilities of the Employer. Most of the Merged Unit employees are working on some aspect of preparing and broadcasting the station's local and network programming, and some employees from the former Unit A and some from former Unit B, such as Photographers and Reporters, regularly work side by side. Photographers sometimes do Reporter work, and both Reporters and various employees from former Unit A occasionally do editing of video tape. Some of the

1968 and 1969. The decertification petitions were filed in 1970. The Board found that an insufficient period of time had elapsed since the merger of the individual units into the larger unit to deny employees an election in the individual units. In this case, however, the employees have petitioned for an election in the Merged Unit, and it is the Union that is seeking to undo its agreement to have the Merged Unit. Accordingly, I find *Duke Power Company* inapplicable to the instant case.

former Unit A employees, such as Photographers, Directors and Associate Producers, have common immediate supervision with former Unit B employees. In addition, some of the duties performed by employees from the former Unit A and from the former Unit B are similar or closely related in nature, such as the work of the Producers (formerly members of Unit B and the Assistant Producers (formerly members of Unit A). Moreover Assistant Producers also regularly substitute for absent Producers. I also note that the Weekend Assignment Editor regularly acts as an Assistant Producer (formerly Unit A work) and as a Producer (formerly Unit B work). It is also significant that, under the contract, all of the Merged Unit employees share a substantial number of common benefits and other terms and conditions of employment, such as health benefits, 401(k) plans and sick leave. Finally, the Board has previously found units similar to the Merged Unit to be appropriate. See *KEZI-TV*, 286 NLRB 1396 (1987); *Kelly Broadcasting Co. d/b/a KCRA-TV*, 273 NLRB 1632 (1985); and *WGAL-TV, Inc.*, 250 NLRB 223 (1980). I therefore find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act and shall direct an election among these employees:

All full-time and regular part-time Master Control Operators,
Maintenance Technicians, Directors, News Photographers &
Editors, Production Assistants, Associate Producers,
Janitorial Employees, Producers, Reporters Weekend
Assignment Editor/Associate Producer, excluding all other
employees and supervisors as defined in the Act¹⁰

¹⁰ In their respective Petitions, the Petitioner and the Employer-Petitioner sought an election in a unit of all full-time and regular part-time reporters, producers, master control operators, engineering

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.¹¹ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 45.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, 361, fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Ronald V. Dellums Federal Building, 1301 Clay Street, Suite 300N, Oakland, California

maintenance technicians, news photographers and editors group, directors group, production assistance group, associate producers, janitorial and weekend assignment editor/associate producers, excluding all anchors, office clerical employees, promotion employees, sales employees, guards and supervisors as defined in the Act. The evidence establishes that the Employer and the Union merged Unit A and Unit B into the Merged Unit as described in the recently executed collective bargaining agreement. This unit appears to be co-extensive with the unit description in the Petitions; however, there are differences in the wording. As noted above, it is established Board policy that, in cases such as this, the unit appropriate in a decertification election must be coextensive with the agreed upon Merged Unit. Fast Food Merchandisers, Inc., 242 NLRB 8 (1979). Here, the unit description language of the collective bargaining agreement is clearly the Union's and Employer's agreed upon description of the Merged Unit, and therefore, for purposes of the election in this case, I have set forth above that unit description rather than the unit description in the Petitions. However, I did change the phrase, "supervisory personnel of the Employer" to read "supervisors as defined in the Act."

¹¹ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

94612-5211, on or before June 13, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 – 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 20, 2002.

Dated at Oakland, California this 6th day of June, 2002.

/s/ Ralph A. Muller

Ralph A. Muller, Acting Regional Director
National Labor Relations Board, Region 32

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